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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 1210

PAUL GINSBURG,

Petitioner,

vs.

CHARLES H. SACHS, WILLIAM C. McELDOWNEY AND MAX PERLMAN

BRIEF OF PETITIONER IN REPLY TO BRIEF FOR RESPONDENTS

PAUL GINSBURG,
Counsel for Petitioner.

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Argument

I. *Respondents did not raise in the court below the objection that petitioner was not a party to the appeal which was non prossed by the Supreme Court of Pennsylvania, and they cannot raise this objection now. Actually petitioner was made a party through the injunction decree obtained by respondents.*

The averments of the petition for reconsideration in the Pennsylvania Supreme Court (R. 7-10) made it plain that your petitioner was made a party to the proceeding by reason of the injunction decree issued by the Court of Common

Pleas (R. 7). As the respondents elected not to file an answer to said petition, the averments must be taken to be admitted (Petition, page 8). Having failed to object in the court below that petitioner was not a party, respondents cannot do so now.

It is contended by the respondents that the decree affects the petitioner only in his representative capacity, that the petitioner cannot inject himself into this case and that this litigation is stale (Brief for Respondents, Page 7). Actually the language of the decree is very plain, and it enjoins your petitioner not as attorney for Phillip Ginsburg but because he was attorney for Phillip Ginsburg. Your petitioner has been advised that if he should file new informations against respondents on the same criminal charges before the injunction decree is dissolved, he would be liable for contempt.

Petitioner did not inject himself into this case. If he was injected into it, that was accomplished by respondents when they procured the injunction decree.

This litigation is not stale, and has never been abandoned. An examination of the Record filed with your Honorable Court at No. 779, October Term, 1945, in the case of *Paul Ginsburg, Petitioner,* v. *Russell H. Adams,* will show that at all times since the injunction decree was entered, in this and related proceedings, the same questions have been actively pressed.

II. *Respondents did not raise in the court below the objection that the Soldiers' and Sailors' Civil Relief Act has no application to this case because the judgment of non pros in the Supreme Court of Pennsylvania was not entered against an appellant in the military service, and they cannot raise this objection now. The judgment of non pros was entered against a party in the military service who was in the same position as appellant, and the statute does have application to this case.*

The averments of the petition for reconsideration in the Pennsylvania Supreme Court (R. 7-10) made it plain that your petitioner was in the position of an appellant in the military service entitled to the benefits of the Soldiers' and Sailors' Civil Relief Act. As the respondents elected not to file an answer to said petition, the averments must be taken to be admitted (Petition, page 8). Having failed to object in the court below that petitioner was not in such position, respondents cannot do so now.

The Soldiers' and Sailors' Civil Relief Act does have application to this case (R. 9, 10), (Petition, pages, 2, 3, 4, 8, 9, 10).

III. *Respondents did not raise in the court below the objection that the Soldiers' and Sailors' Civil Relief Act has no application to this case because no default judgment was entered, and they cannot raise this objection now. The statute does not relate to default judgments only, and does have application to this case.*

The averments of the petition for reconsideration in the Pennsylvania Supreme Court (R. 7-10) showed that the Soldiers' and Sailors' Civil Relief Act does have application to this case. As the respondents elected not to file an answer to said petition, the averments must be taken to be admitted (Petition, page 8). Having failed to object in the court

below that the Soldiers' and Sailors' Civil Relief Act has no application to this case, the respondents cannot do so now. Furthermore, Sections 200 (4) and 201 of the Act (Petition, page 4) have particular application to this case. These sections do not even mention default judgments. Section 200 (4) in effect gives relief from any judgment in any action against any person in military service upon application made not later than ninety days after the termination of such service, which applies to this case (R. 3-5, 9). Section 201 in effect provides that when petitioner personally appeared before the Pennsylvania Supreme Court on September 27, 1943, requesting a continuance (R. 8), (Petition, pages 5-7), his request ought to have been granted, because any proceeding in any court at any stage thereof shall upon application to the court be stayed.

It is further submitted that the judgment of *non pros* (R. 3) was a sort of default judgment, and is commonly frowned upon as a "snap" judgment.

IV. *Both the petitioner and his father have a meritorious and legal defense to the injunction suit.*

The meritorious and legal defense to the injunction suit has been dealt with by your petitioner (R. 9), (Petition, pages 11-13).

The theory of vexatious litigation which respondents framed as a basis for the injunction suit was a smoke screen. This theory was founded upon the construction often given *habeas corpus* discharges being conclusive and being a final termination of the prosecution. Since the foundation of the original theory has no legal basis, the theory itself must fall.

Every step taken by the defendants in the criminal prosecutions, Messrs. Sachs, McEldowney and Perlman, have had as its aim a proceeding before a judge without a jury, to escape the ordinary processes of the criminal law. In the *habeas*

corpus proceedings they presumed to have their guilt or innocence so adjudicated. In the injunction proceeding they went even further by attempting to have their guilt or innocence adjudicated by a court of equity. The Commonwealth, as well as alleged lawbreakers, has an interest in the maintenance of the right of trial by jury. It is difficult to conceive of anything more opposed to sound public policy than to permit an accused to obstruct by means of a suit in equity to which the state itself is not a party the operation in his case of the machinery of criminal procedure which has been constitutionally established to protect the public welfare.

In the criminal prosecutions the defendants have an adequate remedy at law, by defending the charges in criminal court. There they can be acquitted, if, as they claim, they are not guilty. But they cannot be tried in any other court, according to law.

V. *The applicability of the Soldiers' and Sailors' Civil Relief Act was not raised too late. The respondents' objection that it was has been raised too late because they did not raise this objection in the court below.*

The timeliness of raising the applicability of the Soldiers' and Sailors' Civil Relief Act has been adequately dealt with by your petitioner (R. 9-10), (Petition, pages 2-4, 7-10.)

The respondents did not raise in the court below the objection that the applicability of the Soldiers' and Sailors' Civil Relief Act was raised too late, and they cannot raise that objection now.

VI. *The petition for writ of certiorari was not filed too late.*

The timeliness of the filing of the petition has been adequately dealt with by your petitioner (Petition, pages 2, 8-9).

Respondents' erroneous computation of the time for filing appears on page 13 of Brief For Respondents, and is perhaps due to a misapprehension of the procedure applicable. They did cite, however, the correct statutory limitation of three months (28 U. S. C. A. 350) and the correct date of the final order of the Pennsylvania Supreme Court, March 26, 1946, from which date the three months begin (Petition, pages 2, 8-9). The petition was filed on May 7, 1946, within less than one-half the time allowed.

Respondent Charles H. Sachs and his counsel, Louis Caplan, have been partners in the law business for many years under the firm name of Sachs & Caplan, and they long ago got a reputation as bankruptcy experts. However, it is submitted that the reference to general order in bankruptcy No. 36 (Brief for Respondents, page 14) has no application to this situation whatever.

VII. *The criminal prosecutions against respondents, Charles H. Sachs, William C. McEldowney and Max Perlman, have never been properly disposed of in criminal court.*

It is contended on behalf of respondents that the prosecutions against them have twice been adjudicated in criminal court because on two occasions they procured *habeas corpus* discharges. Both times they were discharged under their writs not only before the informations were presented to the grand jury, but also before the "prisoners" were even committed. A writ of *habeas corpus* is an extraordinary writ, granted only in unusual cases where there is a pressing need for it. What makes the granting of the writs in the instant case all the more preposterous is the fact that your petitioner offered his consent each time that the respondents be released on their own recognizances.

To agree with this contention, one must also agree with their legal theory that a *habeas corpus* proceeding can be used as a substitute for trial.

It is elementary that a *habeas corpus* proceeding relates only to the legality of the detention of a prisoner, and that the order of discharge can only be for release out of custody. The *habeas corpus* discharge does not end the prosecution. After such discharge it is still the duty of the district attorney to present the information to the grand jury. However, in the instant case, the district attorney refused to present the informations to the grand jury after the *habeas corpus* discharges, although he had given your petitioner his opinion before the first information was filed that the prosecutions should be instituted and the district attorney had the informations prepared in his office.

Pennsylvania cases in which it is clearly and definitely held that *habeas corpus* discharges have no further effect than to release the prisoners out of custody, are *Commonwealth* v. *Crawford,* 8 Philadelphia Reports, 490; *Schopffel* v. *Kleinz,* Brightly's Nisi Prius Reports, 132; and *Commonwealth* v. *Ridgway,* 2 Ashmead's Reports, 247. There are no authorities to the contrary.

In *Commonwealth* v. *Crawford,* Judge Peirce in his opinion, p. 490, held: "It is not necessary to inquire into the realtive jurisdiction of these officers further than to say, that neither the committal nor the discharge is finally conclusive of the responsibility of the relator for the offense with which he is charged. Not even a discharge under this *habeas corpus* would have any further effect than to discharge the relator out of custody, leaving the alleged offense subject to the investigation of a grand jury, and if a true bill be found, to the final determination of a petit jury—all other investigations being but of a preliminary character for the furtherance of the ends of justice."

In *Commonwealth* v. *Ridgway,* Justice Randall in his opinion, p. 256, the relator having been discharged after the court found no criminal conspiracy had been proved, stated: "It may be proper to state, that the testimony

before the court was different from that before the mayor. Several witnesses, and among them, one said to be the most important for the commonwealth, who were examined there, were not examined in court; and what effect their testimony would have had, it is impossible to tell. Should the counsel for the commonwealth think they can present a different case at a future day, it is gratifying to know, that this decision does not preclude them from sending a bill to the grand jury whenever they may think proper so to do."

In the same case President Judge King in his opinion, pp. 258-259, stated: "I rejoice, however, that our judgment is not conclusive of the subject. The sole effect of this decision is, that in the present state of the evidence, we see no sufficient cause to hold the defendant to bail. It is still competent for the proper public officer, particularly in a different state of the evidence, to submit the case to the grand jury. That respectable body are entirely independent of us; they can form their own views of the prosecutor's case, and may, if their judgment so indicates, place the defendant on his trial; we at present do not see adequate cause to induce us either to restrain him of his liberty, or compel him to give bail to answer. He is discharged."

These opinions of President Judge King and Justice Randall are of particular importance in view of appellant's contention during the *habeas corpus* proceedings that, although he more than established a *prima facie* case, he purposely did not introduce all the evidence before the alderman and that he has additional facts and evidence to present to the grand jury and the trial jury.

In *Schopffel* v. *Kleinz*, p. 132, it was held that, "a discharge on *habeas corpus* does not end the prosecution: it only relieves the defendant from imprisonment, but he may still be indicted on the original complaint."

These decisions are very definite, and they have not been modified.

VIII. *Judge Rowand's Opinion was biased.*

It is stated (Brief For Respondents, Page 10) that petitioner attempted "to brush aside the opinion of the Court of Common Pleas." It is respectfully submitted that the said opinion of President Judge Harry H. Rowand ought to be brushed aside, and set aside. Some of his Findings of "Fact" and Conclusions of "Law" are very unfair, unjust and without foundation. After defendants Sachs, McEldowney and Perlman of the criminal prosecutions had transformed themselves into plaintiffs in equity and framed their injunction case, Judge Rowand thoroughly cooperated with them in making the prosecutor look like a defendant. From reading Judge Rowand's opinion, your petitioner could not recognize the case of the prosecution, nor could he recognize Messrs. Sachs, McEldowney and Perlman, Judge Rowand praised them so highly.

So far as your petitioner and his father are concerned, let us add that your petitioner at that time was a member of the Bar in very good standing and was an elected Officer of the Allegheny County Bar Association; and that his father, Phillip Ginsburg, enjoyed an excellent reputation among his customers and in the community.

Presumably one of the reasons why Judge Rowand adopted such a hostile attitude toward your petitioner and his father was that your petitioner attempted to have Judge Rowand removed from the case on grounds of bias and to have any other judge of said Court of Common Pleas substituted for him. Immediately after the injunction suit had been filed and before it came up to be assigned for hearing from the Assignment Room of the court, Judge Rowand as President Judge of the Court of Common Pleas of Al-

legheny County, ordered the case assigned to himself for hearing. On the day of the preliminary hearing when your petitioner and the parties appeared in the Assignment Room, the case was assigned to Judge Rowand by the Assignment Room judge, to which your petitioner objected contending that this case ought to be assigned in the ordinary course to the next judge (whoever he may be) like any other case. However, the Assignment Room judge replied that the case had previously been ordered assigned to Judge Rowand and that he could not and would not do anything about it. Judge Rowand's opinion, which has been printed as an appendix to Brief for Respondents, fully supports petitioner's contention that the Judge was quite biased throughout the proceedings. During the proceedings, your petitioner after much difficulty, was able to secure a hearing for the purpose of determining whether or not Judge Rowand should be removed from the case. No other judge of the court would preside and Judge Rowand himself finally presided at such hearing, and at the conclusion thereof promptly dismissed petitioner's motion for his removal.

The important facts which Judge Rowand failed to find are that Phillip Ginsburg has been a merchant in Pittsburgh since 1897; that until August 22, 1941, he had been doing business with the Washington Trust Company of Pittsburgh for about 37 years; that the volume of his business with the bank approximated $6,000,000.00; that he repaid all the loans he ever made from the bank in full, with 6% interest; that on August 22, 1941, when he informed Messrs. Sachs, McEldowney and Perlman, who were officers and directors of the bank, Mr. Sachs also being counsel for the bank, that he had arranged for financing in New York City and was no longer doing business with them, they became angry and within the next few days wrote allegedly libellous letters to his customers. They wrote letters de-

manding immediate payment of old accounts which had been assigned to the bank in connection with loans, when they knew that the customers had already paid Phillip Ginsburg and that Phillip Ginsburg had already paid the bank. This was the first time that the respondents violated their agreement with Phillip Ginsburg that they would not give notice of the assignments to his customers and that he could collect the accounts like they were his own, which they were. But at that time, of course, they knew that Phillip Ginsburg would no longer be doing business with them.

Respectfully submitted,

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